

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.189 OF 2005

...

Union of India ...Petitioner

v/s.

M/s. Jay Constructions ...Respondent

...

Mr.Suresh Kumar for the Petitioner.

Mr.S.M.Gorwadkar for the Respondent.

...

CORAM: D.K.DESHMUKH, J.

DATED: 29TH NOVEMBER, 2005

P.C.:

1. By this Petition the Petitioner challenges the

award made by the arbitral tribunal dated 31-08-2004 awarding various amounts under various heads in favour of the Respondent. It appears that by letter dated 17-3-1997 tender submitted by the Respondent for carrying out the work on railway-track was accepted. Completion period of the work was three months from 17-3-1997. Admitted position is that within three months neither the contract was signed nor did the work commence. It is also an admitted position that neither the contractor asked for extension of time to complete the work nor was that extension of time granted. Obviously the contract lapsed due to expiry of time. The railway got the work done departmentally. There was an arbitration clause in the contract, which was signed in the year 1998. Reference was made to the arbitral tribunal. Before the arbitral tribunal the Respondent made claims for various amounts for loss of profit, refund of security deposit, underutilisation of machineries, underutilisation of labour force, underutilisation of over-heads as also for interest on all the amounts claimed against all the above claims.

2. The case of the Respondent before the arbitrator was that after he was awarded the contract he was

ready to commence the work, but the Petitioner did not make arrangement so that he could commence the work. Therefore, he has suffered loss of profit, his labour force remained unutilised and therefore he was claiming damages from the railways. The case of the Petitioner was that the Respondent was neither interested and nor was in a position to commence the work. He did not make arrangement to commence the work. He did not hire any machineries, nor did he hire any labour force to start the work and therefore he is not entitled to claim any amount.

3. The arbitral tribunal has made the award awarding Rs.65,803.43 against claim No.1 i.e. loss of profit, Rs.16,000.00 against claim No.2 i.e. refund of security deposit, Rs.25,000/- against claim No.3 i.e. underutilisation of machinery, Rs.47,250/- against claim No.4 i.e. underutilisation of labourforce, Rs.20,000/- against claim No.5 i.e. under utilisation of overheads.

4. The submission of the learned Counsel appearing for the Petitioner is that though it was disputed before the arbitral tribunal as also it is disputed in the petition that the Petitioner did not make the

arrangement and therefore the Respondent could not start the work, even assuming that to be so, the award for damages could not have been made by the arbitrator in favour of the Respondent without the Respondent leading evidence to show that he had actually engaged labourforce and hired machinery to start the work. The learned Counsel submits that there is no evidence whatsoever led by the Respondent to show that after he was allotted the work he engaged labourforce, hired machineries, hired staff and made other arrangement to commence the work and all these labour force, staff and machineries remained idle because he was not permitted to commence the work. According to the learned Counsel the Respondent has also not led any evidence to show how much profit he would have earned from this contract had he been permitted to complete the work. Without the Respondent leading evidence, the arbitral tribunal could not have made the award.

5. The learned Counsel appearing for the Respondent, though disputed this position that the Respondent has not led any evidence to establish loss of profit and that he had engaged staff, machinery and labourforce, he is not in a position to show from the record that

the Respondent has led any evidence.

6. I have gone through the entire record. I have found that the entire award is based on ipsi-dixit of the learned arbitral tribunal. The Respondent was allotted the work on 17-3-1997. He was to complete the work within three months. He did nothing to commence the work. He has not led any evidence to show that after the work was awarded to him he engaged labour force, that he engaged staff, that he engaged machinery and thus he was in a position to commence the work and that all this expenditure incurred by him was wasted because the railways did not permit him to commence the work. The award against claim nos. 2 to 5 could have been made only on proof of these facts that the labourforce was engaged, machinery was engaged and staff was engaged. So far as award against claim No.1 is concerned, for awarding any amount towards loss of profit, firstly, the burden of proof is on the Respondent to show as to what profit he would have earned from the contract had he completed the work. He would have to establish what would be the percentage of the profit and then only the award could have been made. The Arbitral tribunal under the Act is under a duty to

make its award only on the basis of evidence led before it. The arbitral tribunal cannot make the award without there being any evidence on record. In the present case, I find that the arbitral tribunal has issued a direction for payment of public money without there being any evidence. The award impugned in the petition is, therefore, liable to be set aside. It is accordingly set aside. The Respondent is directed to pay costs of this petition to the Petitioner as incurred by the Petitioner.

...